United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18635

ALBERT AGOBIAN and
ALBERT EGISHIAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court
Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

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I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California, Southern Division, adjudging both appellants guilty of a one-count indictment charging a violation of Title 21, United States Code, Section 174, to-wit, concealment and transportation of illegally imported narcotics. A one-count Indictment was returned by the Federal Grand Jury for the Central Division of the Southern District of California and said Indictment was filed on April 18, 1962 (C.T. 2). Thereafter, on motion by both appellants the cause was transferred pursuant to Rule 19 of the Federal Rules of Criminal Procedure

(18 U.S.C.) to the Southern Division of the Southern District of California (C.T. 7 and 8). Both appellants were convicted after jury trial and judgment entered and sentence imposed on each appellant on October 5, 1962 (C.T. 28 and 29). Both appellants thereafter filed a timely notice of appeal (C.T. 30 and 31).

The District Court had jurisdiction pursuant to the provisions of Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain the instant appeal from the judgment under Sections 1291 and 1294 of Title 28, United States Code and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.)

II.

STATEMENT OF THE CASE

The Indictment returned against appellants by the Grand Jury for the Central Division of the Southern District of California, United States District Court, and filed April 18, 1962, alleged:

> "On or about March 28, 1962, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Albert Agobian and Albert Egishian, knowingly and unlawfully received, concealed and facilitated the concealment and transportation of one gram, 370 milligrams of heroin, a narcotic drug, which as the defendants then and there well knew, previously had been imported into the United States of America contrary to the United States Code, Title 21, Section 173." (C.T. 2)

Subsequent to the return of the Indictment, on motion made by each appellant the cause was transferred for all further proceedings to the Southern Division of California (C. T. 7 and 8).

Jury trial was commenced before the Honorable William C. Mathes on Tuesday, September 18, 1962, at 11:00 a.m. (C. T. 24; R. T. 3). The trial continued on Wednesday, September 19, 1962, (C. T. 25; R. T. 135). At the close of the government's case in chief on the second day of trial, both appellants moved for a judgment of acquittal and both of said motions were denied. (C. T. 25; R. T. 226). On the same day, both appellants rested their respective cases (R. T. 237) and both appellants renewed their motions for acquittal and the motion was denied as to each defendant (R. T. 238 and 239). No rebuttal evidence was presented by the prosecution (R. T. 239). The case was submitted to the jury on Thursday, September 20, 1962, the third day of trial. (R. T. 245 and 278). On the same day a verdict of guilty was returned as to each appellant. (R. T. 286, 287). The cause was continued until October 5, 1962, for all further proceedings and the appellants were given leave to make motions for a new trial. (R. T. 292-295; C. T. 26). On October 5, 1962, the Court entertained oral motions on behalf of both appellants for a new trial. (R. T. 300, 301; C. T. 27). Both appellants urged in support of their motions for new trial that the evidence was insufficient as a matter of law to support the conviction in that there was no evidence whatsoever that the narcotic had been imported into the United States contrary to law nor any evidence that either appellant had knowledge of any such unlawful importation. (R. T. 302-310) The motion for new trial was denied as to each appellant. (R. T. 311; C. T. 27.) On the same day each appellant was committed to the custody of the Attorney General

for a period of ten years. (R. T. 319; C. T. 28, 29.) Both appellants filed timely notices of appeal on October 12, 1962. (C. T. 30, 31)

III.

SPECIFICATION OF ERRORS

1. The statute under which appellants were indicted, tried and convicted is invalid and unconstitutional under the provisions of the Fifth Amendment to the Constitution of the United States in that said statute provides in part:

> "Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (21 U. S. C., 174)

2. The evidence is insufficient as a matter of law to sustain the conviction of either appellant.

IV.

STATEMENT OF FACTS

Ronald Rojas was contacted at his home on March 26, 1962, at 8:00 or 9:00 p.m. (R. T. 26) Rojas was identified by officers who participated in the investigation as an informer, (R. T. 62) or a special employee (R. T. 159). He had previously been arrested for addiction (R. T. 59) and had been observed under the influence of narcotics at a time previous to the time of the incident with which the instant appeal is concerned. (R. T. 89). On March 26, 1962, appellant Egishian

came into Rojas' home and asked the latter to come outside. The two went outside and both sat in Egishian's car and talked in the presence of appellant Agobian. (R. T. 27). One or the other of appellants asked Rojas whether he could get rid of some heroin and Agobian informed Rojas that he, Agobian, had a certain amount of heroin he was attempting to sell. (R. T. 29). Rojas advised he could sell some of the heroin and they arranged a meeting for the following night. (R. T. 30).

The next evening Agobian and Egishian picked Rojas up at his home around 8:00 or 9:00 p.m. and drove to the residence of Egishian where they went into the garage. (R. T. 31). Qualifying his testimony with "I believe", Rojas testified Agobian produced what seemed to be loose heroin in a rubber container. (R. T. 31). Egishian went into the house to get milk sugar and produced a jar. (R. T. 31) Rojas and Agobian mixed both substances in the jar and the total amount after mixing was approximately one ounce. (R. T. 32). A meeting was then arranged for the following evening. (R. T. 32).

The following evening, March 28, 1962, appellants met Rojas about 6:00 p.m. in front of Rojas' place of employment which is a men's clothing store. (R. T. 33). They arrived in a powder blue 1941 Cadillac belonging to Egishian and all three proceeded to the residence of Rojas. (R. T. 34). At that time Rojas was advised they did not have the heroin and he instructed them to leave him at his place of residence and go get the heroin. Earlier in the day of March 28, 1962, Rojas had contacted Sgt. Cook and Officer Weldon of the Sheriff's Narcotic Detail. (R. T. 35). At a later time Rojas observed appellants in the alley in the samepowder blue 1941 Cadillac. (R. T. 36). Rojas admitted that he was a user of narcotics in March of 1962, (R. T. 45) but did not recall whether he had used on March 28,

1962. (R. T. 48).

The events which commenced with meeting Rojas at his place of employment at approximately 6:00 p.m. on March 28 and continued thereafter were surveilled and participated in to varying degrees by officers of federal and state investigating agencies including Penn R. Weldon of the Sheriff's Office (R. T. 53); William D. Stoops of the Sheriff's Office (R. T. 67); Jim Henry of the Sheriff's Office (R. T. 105); Raymond Velasquez of the Sheriff's Office (R. T. 63); and agents Richard Rock and Francis Briggs of the Federal Bureau of Narcotics (R. T. 137, 215).

Deputies Weldon and Stoops observed appellants circling the area of Rojas' employment at approximately 6:00 p.m. on March 28, 1962. (R. T. 54, 57). The officers were there because of the fact their agency had previously been contacted by Rojas. (R. T. 54). Rojas was observed entering the vehicle driven by Egishian and the vehicle was followed into an alley where Rojas departed. (R. T. 54, 55, 57). The Cadillac left the area and visual contact was lost. (R. T. 55). At approximately 6:30 p.m. the 1941 powder blue Cadillac returned to the area with Egishian driving and Agobian still a passenger. (R. T. 55, 77). The vehicle came to a stop at which time Deputies Weldon and Velasquez with Agent Briggs approached the passenger's side, Weldon identifying himself as a deputy sheriff. (R. T. 55, 56, 76, 164) Deputy Stoops driving a vehicle occupied by Agent Rock and Deputy Henry pulled in behind the Cadillac and to its left side. (R. T. 78) Deputy Henry approached the driver's side of the Cadillac and identified himself as a sheriff and said "Freeze". (R. T. 76, 106, 164). Deputy Velasquez approached the vehicle

on foot from the driver's side and stated "Sheriff's officers". (R. T. 165) At that point the Cadillac began moving rapidly in reverse out of the alley and continued in reverse for approximately one-half block after leaving the alley in an erratic manner until it came to rest after striking a parked vehicle. (R. T. 56, 57, 58, 79, 106). Deputies Weldon, Henry and Velasquez fired at the vehicle. (R. T. 63, 119, 166). Deputy Weldon and Agent Rock testified they saw nothing fall from the vehicle. (R. T. 65, 158). However, Deputy Stoops testified he observed an object thrown from the passenger's side of the Cadillac. (R. T. 79) Although Deputy Velasquez was firing his weapon (R. T. 166) he testified that he heard glass shattering as the Cadillac was backing up erratically. (R. T. 167). Deputy Velasquez testified that after the Cadillac came to rest he observed Agobian put both of his hands out and Agobian dropped a small package which Velasquez instructed Agent Rock to retrieve. (R. T. 168, 169, 214). Agent Rock and Deputy Velasquez subsequently searched the vehicle and found no heroin. (R. T. 162, 196). Velasquez did, however, take two tablets from Agobian which were not heroin. (R. T. 181).

Exhibit 1C was a powdery substance retrieved from the gutter by Agent Rock, (R. T. 143) which was analyzed and found to be one-half of one gram of heroin. (R. T. 15, 17).

Exhibit 2B was found to be approximately one-half of one gram of heroin, (R. T. 16, 18) taken from a jar lid found 80 feet west of the place where the Cadillac struck the parked automobile. (R. T. 139, 142, 146, 183).

Exhibit 3B constituted approximately 3/10 of one gram of heroin. (R. T. 16, 18) scraped up from blotches of powder approximately 20 feet from the alley by Deputy Stoops. (R. T. 81, 140).

Exhibit 4 consisted of glass fragments retrieved by Agent Rock near the jar lid which was found approximately 80 feet west of the place where the vehicle occupied by appellants came to rest. (R. T. 142, 185).

After his arrest, Egishian was interviewed by Deputy Henry in the presence of Agent Rock. (R. T. 109, 110). Egishian stated that he was going to meet a party by the name of Ronnie Rojas concerning a clothing deal, (R. T. 110) that Rojas lived in a house in the alley but Egishian did not know which one. They had gone to Worth's Clothing Store but could not make contact with Rojas so had come to his house. (R. T. 111) Egishian stated he picked the party up at Paul's Drive-in and they proceeded to Worth's and from there to the location of the arrest. (R. T. 114) The record is totally devoid of any statement by Egishian to the officers concerning narcotics.

Agobian was interviewed by Agent Briggs at the sheriff's station. (R. T. 215). Agobian stated that he had come from Riverside that afternoon to visit his wife and had been driving around with Egishian looking for a person by the name of Ronnie. (R. T. 217). Agobian denied having been further west than Atlantic although Agent Briggs testified that Worth's Clothing Store is a mile and one-half to two miles west of Atlantic Boulevard. (R. T. 217). Agobian stated he had gone to the alley with Mr. Egishian and that he didn't know what had happened. When the officers approached, all of a sudden the car went in reverse and he ducked down in the passenger's seat. At about the same time he heard some glass breaking. (R. T. 217 - 219). With respect to Agobian, the record is also devoid of any statement by him to the officers concerning heroin.

Russell Goudy was called by Egishian (R. T. 227) and testified that he came

out of his front door just after the vehicles collided (R. T. 233) and did not see anything thrown from the car nor did he see any hand reach out of the windows of the vehicle. (R. T. 232)

V.

ARGUMENT

A. The Statute Under Which Appellants Were Indicted, Tried and Convicted Is Invalid and Unconstitutional as Being Violative of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> "No person shall be *** compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ****"

The statute under which appellants were charged, tried and sentenced provides in part as follows:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."
>
> Title 21, U. S. C., Section 174.

It is submitted that the provisions of the statute just quoted and the provisions of the Constitution are irreconcilable and that the latter, therefore, must be held

invalid. Appellants are cognizant of the fact that the provision of law which they now challenge has been carefully considered and sustained by numerous decisions, e.g. Yee Hem v. United States, 268 U.S. 178 (1925); Bradford v. United States, 271 F.2d 58, 60-61 (9th Cir. 1959); Cellino v. United States, 276 F.2d 941, 943-946 (9th Cir. 1960); Cutchlow v. United States, 301 F.2d 295, 297 (9th Cir. 1962). It is submitted, however, that the provisions of Title 21, United States Code, Section 174, making possession of a narcotic sufficient of itself to convict a person of transportation or concealment of narcotics known by the defendant to have been imported in the United States contrary to law unless that possession is explained to the satisfaction of the jury should be, and indeed must be, re-examined in light of the decision by this Court in Russell v. United States, 306 F.2d 402 (9th Cir. 1962) and the decision and the language of the Supreme Court of the United States in United States v. Kahriger, 345 U.S. 22 (1953). In Russell v. United States, supra, the provisions of Title 26, United States Code, Section 5841 requiring registration of a firearm was struck down as being violative of the prohibition against self-incrimination guaranteed by the Fifth Amendment to the Constitution.

Appellants can see no logical distinction between a rule of law requiring the possessor of a firearm to register the same and a rule of law requiring a defendant in a criminal case after the close of the government's evidence to explain possession of a narcotic. Certainly the dilemma of the persons involved in these separate situations are the same and the sanctions the same, namely, the invoking of a criminal penalty unless the individual takes some action which is or might be detrimental to his liberty or life.

Furthermore, it would appear that the very vice which the majority opinion found did not exist with respect to the statute considered by the Supreme Court in United States v. Kahriger, supra, is certainly present in the statute of which appellants herein complain. In considering the constitutionality of Title 26, United States Code (Supp. V) Section 3285, imposing a tax on persons in the business of accepting wagers, Mr. Justice Reed spoke for the majority of the Court and sustained the statute noting:

> "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." (United States v. Kahriger, supra, pages 32-33)

By its very nature, the provisions of Title 21, United States Code, Section 174, of which appellants complain, require testimony concerning past activities and require it under penalty of conviction. The unhappy plight of appellants herein at the close of the government's case is graphically illustrated by the dissenting opinion of Mr. Justice Black with which opinion Mr. Justice Douglas concurred in United States v. Kahriger, supra, wherein it was noted:

> "***I am sure that it creates a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling laws. The coercion of confessions is a common but justly criticized practice of many countries that do not have or live up to a Bill of Rights. But we have a Bill of Rights that condemns

coerced confessions, however refined or legalistic may be the technique of extortion." (Page 37)

At the time of the events which transpired in Los Angeles on March 28, 1962, California had in force and effect a statute which provides in part:

"Except as otherwise provided in this division, every person who possesses any narcotic other than marijuana except on the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for not less than two years nor more than ten years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years in prison." Section 11500 Health and Safety Code, State of California (as amended Stats. 1959, c. 1112, p. 3193, section 3; Stats. 1961, c. 215, p. 1234, section 38; Stats. 1961, c. 274, p. 1301, section 1)

Appellants respectfully submit that the provisions of Title 21, United States Code, Section 174, of which they complain are irreconcilable with the opinions of United States v. Kahriger, supra, and the opinion of this Court in Russell v. United States, supra, and should be struck down.

Separate and apart from the problem of compulsory self-incrimination, the statute involved in the instant case should be carefully re-examined in light of the due process requirement of the Fifth Amendment of the Constitution of the United States. It would appear that in making possession alone sufficient evidence to

convict a person of transportation or concealment of a narcotic which had been imported into the United States contrary to law knowing that the narcotic had been so imported, Congress took a bootstrap approach to control what should be a problem for resolution by the individual states.

> "***Congress may not go beyond the powers delegated to the Federal Government under the Constitution of the United States. Congress may control traffic and narcotic drugs in accordance with its power over interstate and foreign commerce and under its tax power, but its ability to declare mere possession of a narcotic unlawful is doubtful." Griego v. United States, 298 F. 2d 845, 848, (10th Cir. 1962)

It would appear that there is simply no rational connection between possession of a narcotic and knowledge that the narcotic had been imported into the United States contrary to law. The matter should be re-examined in light of Mr. Justice McReynolds' dissenting opinion in Casey v. United States, 276 U.S. 413 (1928) at page 420 where he noted:

> "The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary."

Appellants submit that a fair and objective re-evaluation of the provisions of Title 21, United States Code, Section 174 compel the conclusion that the observation of Mr. Justice McReynolds is correct.

B. The Evidence Is Insufficient as a Matter of Law to Support the Conviction of Either Appellant.

Assuming arguendo that the provisions of Title 21, Section 174 making

evidence of possession a sufficient predicate for inferring unlawful importation and knowledge thereof, then it is submitted the evidence in the instant case was insufficient to invoke this rule of law. Appellants take the position that the government's case must stand or fall based on the showing of possession of the heroin retrieved near the place where their vehicle collided with a parked auto (Exhibit 1C, R. T. 143, 168, 185, 214; Exhibit 2B, R. T. 139, 146, 183; Exhibit 3B, R. T. 140, 223) which substances were examined by an expert and found in truth and fact to be heroin. (R. T. 15, 16, 17, 18). Although the informer Ronald Rojas testified concerning the handling of heroin on the preceding evening, it should be noted that (R. T. 31, 32) this substance was never analyzed nor a sample taken therefrom which would justify conviction predicated on Rojas' testimony.

Turning to an analysis of the events which transpired on March 28, 1962, they simply show that a vehicle driven by Egishian in which Agobian was a passenger stopped in an alley and when officers of the Sheriff's Department approached, the vehicle was placed in reverse and backed out of the alley rapidly. As the vehicle proceeded erratically down the street, an object was seen to be thrown out of the vehicle through the passenger's window by one deputy and another deputy heard glass breaking. After the vehicle came to rest, one deputy testified that for a fleeting instant he saw appellant Agobian's hands come out of the automobile and a cellophane packet drop which was ultimately examined and found to contain heroin. It is submitted that this evidence of possession is entirely speculative as to appellant Egishian and even taking the evidence of the government in a light most favorable, it shows at the most a fleeting possession by appellant Agobian. For this reason they respectfully submit that the same results should obtain as to them as obtained

as to the defendant Narducci in United States v. Santore, et al., 290 F. 2d, 51 (2d Cir. 1960) Cert. denied 365 U. S. 834. The disposition of that case as to Narducci can best be illustrated by the following excerpts from the opinion:

"***The evidence presented by the Government shows that on the night in question Narducci was observed furtively attempting to remove a package containing narcotics from the trunk of a parked automobile. Tarlentino then met with Napolitano and Tolentino and explained to them that 'the kid got scared and left the package in the car.' The next morning, upon their arrest, Narducci impliedly admitted that he knew that the package contained narcotics,***" (290 F. 2d at page 64)

"***The Government argues that Narducci's momentary grasp of the package constituted "possession" of it by him, and that at that moment the crimes with which he and Tarlentino were charged were completed. We cannot agree. A statutory presumption is valid only where there is a rational and not unreasonable connection between the ultimate fact to be presumed and the fact proved. Yee Hem v. United States, 1925, 268 U. S. 178, 45 S.Ct. 470, 69 L.Ed. 904, supra. The crime punishable under section 174 is not the possession of narcotics, but rather the transporting, concealing, receiving, buying or selling of narcotics; and, consequently, in order to make the statutory presumption contained in that

section meet the test of validity we must define 'possession' as used therein so as to include only that type of control from which it could not unreasonably be inferred that the possessor was going to commit one or more of the specified acts which have been declared criminal. Narducci's grasp of the package was clearly not such possession, for he voluntarily released it one brief moment later." 290 F.2d pages 64-65.

"***We agree with the original panel's opinion that his momentary grasp did not amount to the possession required in order to activate the statutory presumption against him." 290 F.2d at p. 79.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court as to each appellant should be reversed.

Respectfully submitted:

PETER J. HUGHES

Attorney for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER J. HUGHES